No. 196.
Brief of Jones for D. E.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1900.

No. 196.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,*

vs.

WILLIAM M. WARREN, *Defendant in Error.*

Error to the Supreme Court of the State of Ohio.

No. 17,631.

Brief for Defendant in Error.

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Attorneys for Defendant in Error.

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JURISDICTION.

We do not concur with counsel for plaintiff in error that the "sole question for determination in this case is the constitutionality of section 3625 of Bates' edition of the Revised Statutes of Ohio."

We maintain there is a precedent question of jurisdiction first to be determined by the court, before it will pass upon the question of the constitutionality of said statute. We assume as correct principles of law, that:

"It is never too late to consider the question of jurisdiction in

the courts of the United States, and if at any time the want of jurisdiction should appear, it is the duty of the court to dismiss the case."

Desty's Federal Proceedure, 403, Par. 84, and authorities there cited.

"It is the duty of the federal appellate court to take notice of its own motion that the record does not show jurisdiction, &c."

Desty's Federal Proceedure, 403, Par. 84, and authorities there cited.

"The presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."

Desty's Federal Proceedure, 340, Par. 84, and authorities there cited.

"The jurisdiction of the Circuit Court is limited, depending either upon the existence of a federal question, or diverse citizenship of the parties, and where it does not obtain, it is an inflexible rule that it can not be exercised, even if both parties desire to have it exerted."

Desty's Federal Proceedure, 340, Par. 84, and authorities cited.

The foregoing authorities refer more particularly to the jurisdiction of the Circuit Court of the United States, but the same rule obtains in the United States Supreme Court.

"Jurisdiction is not conferred by consent. (Mills v. Brown, 16 Peters, 525.)"

Desty's Federal Proceedure, 767, Par. 223.

"A writ of error from the Supreme Court to review a state judgment can only be maintained under the circumstances defined in Sec. 709, U. S. Statutes. (Duncan v. State of Missouri, 152 U. S., 377.)"

Desty's Federal Proceedure, 767, Par. 223.

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"The Supreme Court must determine for itself whether the suit really involves any federal question, which will entitle it to review the judgment of the State Court. (Newport Light Co. v. City of Newport, 151 U. S., 527.) It is required that it should be apparent on the record that one of the questions arose, and that a decision was made thereon. (Crowell v. Randell, 10th Peters, 368.)"

Desty's Federal Proceedure, 768, Par. 223.

"It must appear from the record that the act or constitution was drawn in question. (Miller vs. Nichols, 4 Wheaton, 311.)"

Desty's Federal Proceedure, 768, Par. 223.

"The question must appear to have arisen by clear and necessary intendment. (Ocean Ins. Co. v. Pollys, 13 Peters, 371) and to have been necessarily involved (Armstrong v. Treas. 16 Peters, 281; Mills v. Brown, 16 Peters, 525) so that the State Court could not have given judgment without deciding it. (Davis v. Texas, 139 U. S., 651; Johnson v. Risk, 137 U. S., 300; California Powder Works v. Davis, 151 U. S., 389; Winter v. Montgomery, 156 U. S., 385.)"

Desty's Federal Proceedure, 768, Par. 223.

"Neither the argument of counsel, nor the opinion of the Court below can be looked to for this purpose. (Gibson v. Chouteau, 8 Wall., 314.)"

Desty's Federal Proceedure, 769, Par. 223.

"The Supreme Court can review such a judgmeut only when the right, privilege, or immunity claimed under the constitution or any treaty or statute of the United States was specially set up or claimed in the State Court at the proper time and in the proper way."

Desty's Federal Proceedure, 770, Par. 223, and authorities there cited.

"The question must have been raised before judgment in the Court below. (Miller vs. Cornwall R. R. Co., 168 U. S., 131; Union Mut. Life Ins. Co. v. Kirchoff, 169 U. S., 103; Bushnell v. Crooke M. & S. Co., 148 U. S., 682.)"

Desty's Federal Proceedure, 770, Par. 223.

"Where the question was decided on an independent ground broad enough to maintain the judgment, and not involving a federal question, this Court will dismiss the writ of error without considering the federal question. (Beatty v. Benton, 135 U S., 224; Marrow v. Brinkley, 129 U. S , 178; Hale vs. Akers, 132 U. S., 554; San Francisco vs. Itsell, 133 U. S., 65; Hopkins vs. McClure, 133 U. S., 380.)"

Desty's Federal Proceedure, 772, Par. 223, and other authorities there cited.

"The statute must be specifically set up by the party, and the decision must be against the claim (Montgomery vs. Hernandes, 12 Wheaton, 129;) * * * the point must be distinctly raised in the Court below. (Hoit vs. Sheldon, 1 Black, 518; Yesler v. Board of Harb r Commrs., 146 U. S., 646; Morrison vs. Watson, 154 U. S., 111; Zadig v. Baldwin, 166 U. S., 485; Oxleg Stave Co. v. County of Butler, 166 U. S., 648; Kipley vs. State of Illinois, 170 U. S., 182,) and shown by the record (R R. Co vs. Rock, 4 Wall., 177; Louisville & N. Ry. Co. vs. City of Louisville, 166 U. S., 709; Powell v. Brunswick County, 150 U. S., 433; State of Conn. v. Woodruff, 153 U S , 689; Bobb vs. Jameson, 155 U. S., 416; Re William Robertson, 156 U. S., 183) * * * Nothing out of the record can be taken into consideration."

Desty's Federal Proceedure, 773, Par. 223.

"A certificate of the presiding Justice is not conclusive to show that a federal question was raised in the case (Caperton v. Boyer, 14 Wall., 216,) nor the record of the Judge who tries the

case at nisi prius. (Inglee v. Coolidge. 2 Wheaton, 363.) Where the decision is made on settled preexisting rules of general jurisprudence, the case can not be brought here for review, (Bank of W. Tennessee v. Citizens Bank, 14 Wall., 9; Palmer v. Marston 14 Wall., 10; Sevier v. Haskell, 14 Wall., 12; Delmas v. Ins. Co., 14 Wall., 661) nor if decided exclusively upon the principles of the jurisprudence of the State. (Marqueze vs. Bloom, 16 Wall., 351.)"

Desty's Federal Proceedure, 774, Par. 223.

"But if the decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review in the Supreme Court. (Chapman vs Goodnow, 123 U. S., 540.)"

Desty's Federal Proceedure, 775, Par. 223.

The question of jurisdiction is one that is not waived and can not be conferred even by consent, and we claim that the record in this case does not state facts sufficient to bring the question of the constitutionality of Sec. 3625 of Bates' edition of the Revised Statutes of Ohio before the Court, and if we are right in this, the Court will dismiss the case for want of jurisdiction. It can not be rightfully claimed that the question was in any way before the nisi prius or Common Pleas Court, nor was it in any way made an issue by the answer of the defendant company in said Court. (See answer, printed record, pp. 8, 9, 10.) It was not even suggested in argument. No request was made to the Court to charge the jury that said section was void by reason of its being in violation of the Fourteenth Amendment to the Constitution of the United States, or for any other reason. (See special request, printed record, pp. 90, 91.) Nor was the question suggested in the exceptions to the general charge, given by the

Court to the jury. (See printed record, pp. 97, 98.) Nor is the question raised in the motion for a new trial. (See printed record, 13.) It is not raised by the petition in error to the Circuit Court of Delaware County, Ohio, (See printed record, p. 13,) nor in the judgment of said Circuit Court, nor in the petition in error from said Circuit Court to the Supreme Court of Ohio (Printed record, p. 1.) The final judgment was entered October 11th, (Record 114), and special "mandate issued" October 18th, 1898, (Record 115). Afterward, an ex-parte application was made to the Court, and the Court made the certificate that counsel, in their brief, raised the constitutional question, &c., and the certificate of the Court was entered December 23d, 1898, more than two months after the final judgment was entered and "mandate issued." (See Clerk's certificate to transcript, Record 115). This was after the case was sent by mandate to the lower Court for execution. The judgment and certificate of the Court are erroneously printed in the transcript as one entry, but there were in fact two entries, as shown by the Clerk's certificate. The date of the first journal entry (Record 114) and date of "mandate issued" (Record 115) and the certificate of the Clerk of the Court, when considered together, show conclusively that the judgment, special order of mandate, and order certifying the entry of judgment to the lower Court were made October 11th and 18th, and included in the first journal entry of October 11th, and that the certificate of the Court, as certified by the Clerk, was entered December 23d, 1898. We claim that this subsequent, ex-parte certificate of the Court is no part of the record; that the unconstitutionality of the statute is not "specially set up or claimed," as required by Sec. 709, U. S. Statutes, and was not "claimed at the proper time and in the proper way," as the law requires to give the Court jurisdiction, and that for these reasons, the proceedings in error should be dismissed.

We further call attention to the fact that the defendant insurance company does not allege in its answer (Printed record, pp. 8, 9) that any of the answers to the questions in the application claimed to be false were *material, and without such an allegation, the answer fails to state a good defense on the ground of fraud, if the statute in controversy had never been enacted.* The certificate of the presiding Judge is not conclusive as to the necessity of passing on the constitutionality of the statute, and it was not necessary, according to the view taken by the Supreme Court of Ohio, in this case, for the Court say in their opinion "It will be noticed that the insurance company fails to allege that the answers to the questions were material, and without such allegation failed to state a ground of defense, as it matters not how false and how fraudulent such answers may be, if they are not material, they furnish no ground for defense to the company issuing the policy."

The Supreme Court of Ohio also held, prior to this case, in the case of Aetna Insurance Co. vs. Reed, 33 O. St., 283, which case was one involving a question relating to fire insurance, to which the section of the statutes involved in this case does not apply, as follows:

> "One seeking to be relieved from a contract, on the ground of alleged false representations, must show there were in fact, false representations of a *material* fact, upon which he relied, and upon which, from the circumstances of the case, he had a right to rely, and, in doing so, was misled to his injury."

Again in this case the Court say, on page 292 :

> "But it is not every erroneous representation that will avoid a contract. To have that effect, it must be as to a fact *material* in the transaction, not mere opinion. It must be a representation of a *material* matter upon which the party, whom it affects injuriously, had a right to rely, and did rely."

"A misrepresentation, in order to constitute fraud, must contain the following essential elements: (1.) Its form as a statement of fact; (2.) Its purpose of inducing the other party to act; (3.) Its untruth; (4.) The knowledge or belief of the party making it; (5.) The belief, trust, and reliance of the one to whom it is made; (6.) Its *materiality*.'

Pomeroy's Equity Jurisprudence, Vol. 2, p. 357, Par. 876.

"The last element of a misrepresentation, in order that it may be the ground for any relief, affirmative or defensive, in equity or at law, is its *materiality*. The statement of facts of which it consists must not only be relied upon as an inducement to some action, but it must also be so *material* to the interest of the party thus relying and acting upon it, that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation. In short, the representation must be so *material* that its falsity renders it unconscientious in the person making it to enforce the agreement, or other transaction which it has caused."

Pomeroy's Equity Jurisprudence, Vol. 2, p. 385, Par. 898.

This is the holding of the Supreme Court of Ohio, and as such holding involves no constititutional question, it is not subject to review by the Supreme Court of the United States. The view of the law, taken in the case at bar, by the Supreme Court of Ohio, is in harmony with its prior decisions. It is not necessary therefore to sustain the judgment rendered herein that the decision of the constitutionality of Sec. 3625 be passed upon. It comes within the law expressed in Desty's Federal Proceedure, 775, Par. 223. The decision is such that the question of the constitutionality of Sec. 3625 is rendered unnecessary by the view which the Court properly takes of the rest of the case, within the scope of the pleadings, and for this reason the judgment is not open to review in the Supreme Court of the United States, and this case should be dismissed.

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"THE UNDISPUTED FACTS."

In our opinion a discussion of the evidence at this stage of the case is immaterial, but we cannot let the claim of learned counsel for plaintiff in error, as to what they term "the undisputed facts and undisputed testimony" pass without challenge. All the issues of fact made by the pleadings were found by the jury in the trial court against the claim of the Insurance Company, and yet opposing counsel have constructed an imaginary statement of "undisputed facts," and with vigorous assault have proceeded to demolish the creature of their own creation.

We call attention to a few of their many statements that are not sustained by the record.

At page 3 of counsel's brief, they say:

> "The undisputed testimony in the record shows that in February, 1893, George E. Warren had gonorrhea and stricture. . . . That 'no testimony was offered which even tended to disprove the evidence of Dr. Wells. (Referring to their star witness, Dr. W. S. Wells, of Marion, Ohio, and not to Dr. Frank Wells, of Boston, the medical director of the Insurance Company.) Upon the other hand the evidence of Warren's other doctor, Arthur L. Gast, whom Warren consulted after leaving Dr. Wells, corroborates and supports the testimony of Dr. Wells. Plaintiff tried to break the force of this admission by showing gonorrhea and stricture were harmless diseases, and it would seem from the verdict that they did so deceive and convince the jury, who were under the charge of the Court, and the construction put upon the statute permitted to make a new contract to the effect that it was."

The latter clause of the quotation would seem to imply an insinuation against the fairness of the honorable judge who presided at the trial, or perhaps an insinuation that the plaintiff below, or his counsel, had the Court hypnotized. The plaintiff below not only TRIED to show that "gonorrhea and stricture were

harmless diseases," but DID show by most clear and uncontradicted evidence that gonorrhea is a harmless disease, and THAT GEORGE E. WARREN NEVER HAD EITHER GONORRHEA OR STRICTURE.

The defense to the action below, as made by the answer (see Record, page 9,) was:

> "First, the defendant denies that the said George E. Warren was in good health on the 27th of September, 1895, at the time said policy of insurance was delivered. . . .
>
> "Second, the defendant further says that the said application of the said George E. Warren contained interrogatories therein, in answer to which interrogatories the said George E. Warren stated that at the time said application was made he was in good health, that he had not been obliged to consult a doctor during the ten years last preceding the date of said application, except once, and that was in 1893, for malarial fever, which sickness was of one week's duration; that the last time he had consulted a physician was in the year 1893, on account of said attack of malarial fever; that he had never had or been predisposed to the disease known as syphilis, and that he had never had any illness or disease other than malarial fever in 1893. The defendant says that at the time said statements were made, they were all and each of them false and untrue, and were known to be so by the said George E Warren at the time he made them, and that they were made by said George E. Warren for the purpose of defrauding this defendant. The defendant says that at the time said application was made, the said George E. Warren had syphilis, and he knew it; that he had been obliged frequently during the ten years immediately preceding the making of said application, to consult a physician on account of said disease; that he had a disease or diseases other than as stated in his said application, and that he was not at the time said application was made, in good health."

It is apparent, then, from the answer made by the defendant below that it based its defense to the action on the claims: 1st, That George E. Warren, at the time he made his application for insurance, and at the time the policy was issued was not in

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good health; and 2nd, that in 1895 said Warren had and was treated for syphilis; and upon these issues the case went to trial.

Upon the first proposition, to-wit: that Warren was not in good health at the time the policy was issued, the defendant below offered no testimony whatever. The evidence of every witness who testified on the subject was clear, positive and undisputed, that Warren was at the time, and for more than two years had been, a perfectly well and sound man; and no claim was made at the trial, or was ever made other than in the answer, to the contrary. But plaintiffs in error did call Dr. W. S. Wells, of Marion, who had treated the deceased in February of 1893, to prove that Warren had syphilis; but the witness testified positively that he had not treated him for syphilis, but that he did treat him for what the witness called gonorrhoea; that is, "I diagnosed a case of gonorrhoea." (See printed record, page 19.) And it is upon the testimony of this witness ALONE that plaintiff in error bases its claim that George E. Warren had gonorrhea and stricture, while upon cross examination (see pages 21, 22, 23, 24, 25 and 26 of printed record) the witness testifies that he could not testify positively that Warren had ever had gonorrhea; he could not testify whether the disturbance for which he treated him was simple urethritis or gonorrhea, that he made no microscopic examination to ascertain. At page 23 the witness testifies that it is very difficult to distinguish between urethritis and gonorrhea: that the ONLY SURE way to distinguish between the two disorders is with the microscope; that he made no microscopical examination; that urethritis is never gonorrhea; that the two diseases are often mistaken the one for the other.

At page 25 the witness testifies as to the various ways in which urethritis may be produced. That there is no connection whatever between gonorrhea and syphilis. That they are two entirely

distinct diseases. That while syphilis is a constitutional disease, gonorrhoea is a mere local disease, of NO MORE SERIOUS NATURE THAN A COLD OR A BOIL. (See printed record, page 26.)

Q. I will ask you if gonorrhoea is any more constitutional than a boil?
A. No, sir.
Q. I will ask you if gonorrhoea is necessarily or at all inimical to longevity, long life? I will ask you if gonorrhoea shortens life?
A. No, sir.

Upon this evidence plaintiff in error makes the bold claim that George E. Warren had gonorrhoea; whereas if his testimony stood alone, the jury could not have been justified in finding that the insured ever had either gonorrhoea or stricture, the two principal things about which counsel say George E. Warren LIED when he answered the questions in the application for insurance.

And we here call the Court's special attention to the questions asked and answered in the application (see record, pages 6 and 7). Of the more than fifty diseases or infirmities enumerated in the application, the Company itself did not deem gonorrhoea material or of sufficient importance to place it in the list covering about all the diseases to which human flesh is heir.

Dr. Frank Wells, the medical director, a most intelligent witness and honest man, is compelled to admit this when he testifies at page 70 of record, as follows:

Q. I will ask you, Doctor, if it is not a fact that your Company has issued policies when the applicant has answered that he had gonorrhoea?
A. Yes, sir.

Dr. Gast, who counsel say treated George E. Warren, and whose testimony they say "corroborates and supports the testi-

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mony of Dr. Wells," was called by the defendant below,—his testimony will be found at pages 30 to 35—testifies positively that George E. Warren did not have gonorrhoea; that he attended Warren the latter part of February or the first part of March, of 1893; that the only trouble with which he was suffering was an inflammation of the meatus; that that was all he found; that the inflammation was not as great as he would find in a case of balanitis; that he treated him again in December of 1893 for malarial fever; that he, Warren, thoroughly recovered, so that witness considered him a sound man.

Nothing in the testimony of Dr. Gast even tended to establish the claim of the Insurance Company that George E. Warren ever had gonorrhoea or stricture, or that he ever had any serious ailment other than malarial fever in December of 1893, and that was of short duration, only lasting three weeks, and that he made a complete recovery, and was thereafter a perfectly sound, well man, and he knew him from that time to the time Warren was killed by the accidental discharge of a gun.

That Warren was in good health when he applied for the insurance is conclusively proven by Dr. John B. Schueller, of Columbus, the local medical examiner of the Insurance Company, called on behalf of the defendant below, whose testimony will be found at pages 36 to 45 inclusive, and to which we refer. This witness examined Warren at the time he applied for insurance. He gave him a careful physical examination, and at page 42 testifies that he found him in "perfect health" and "safely insurable," and so recommended that the Company issue the policy. At page 43, witness testifies that he examined George E. Warren for "life insurance on the 17th day of September, 1895;" that he considered him "a sound man."

Q. Did you see anything about him that would indicate to your mind at that time that he was not a physically sound man?
A. No sir.

And this was after the Doctor had examined the applicant for syphilis, stricture or diseases of the generative organs, (see page 41.) After he had anaylzed the urine and "given him a careful examination."

Q. And upon that examination, made on the 17th day of September, 1895, you regarded George E. Warren as a sound man physically?
A. Yes, sir.
Q. I will ask you if you saw anything about George E. Warren at that time that would indicate to you or to your mind that he had the disease known as syphilis?
A. He showed no symptoms of it.
Q. Did he show any symptoms of having ever had gonorrhea?
A. Not to my knowledge. (See printed record, page 43.)

The plaintiff below called as witnesses Doctors Arthur Gast, W. F. Crickard, E. H. Hyatt, J. S. Lunger, J. W. N. Vogt, C. W. Chidester and R. C. Richey; also plaintiff called Judge E. M. Wickham and John Haskett, each and every one of whom gave evidence at the trial impeaching the testimony of Dr. Wells before the jury.

We refer the Court to printed record, pages 65, 66 and 67, for testimony of Dr. Crickard; pages 70, 71 and 72 for testimony of Dr. Hyatt; pages 76 and 77 for testimony of Dr. J. S. Lunger; pages 81 and 82 for testimony of Dr. J. W. N. Vogt; pages 83 and 84 for testimony of Dr. C. W. Chidester; pages 85, 86 and 87 for testimony of Dr. Richey; pages 88 and 89 for testimony of Judge E. M. Wickham; pages 73, 74, and 75 for testimony of John Haskett.

Doctors Crickard, Hyatt, Vogt, Chidester, Lunger and Richey all testified that according to medical science it would have been impossible for stricture of the urethra to have developed as testified to by Dr. Wells; and yet in the face of all this testimony it is assumed by counsel that Warren had both gonorrhoea and

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stricture, and they say "no testimony was offered which even tended to disprove the evidence of Dr. Wells." The testimony of each and every one of these six medical experts proved conclusively that the testimony of Dr. Wells to the effect that Warren had gonorrhoea or stricture was untrue. They each and all testified that the disease known as gonorrhoea is local in its character, is not constitutional, that it is not inimical to longevity, that it does not shorten life, that it is not one of the infirmities or ailments that is considered material in life insurance. The fact that it is not included in the list of infirmities printed in the application would seem as well to establish the fact that the INSURANCE COMPANY ITSELF does not regard it as material to the risk. Moreover, Dr. Lunger testifies, pages 76 and 77, that he treated George E. Warren's wife during the months and afterward that it was claimed that Warren was suffering with gonorrhea; that Warren and his wife were living together as man and wife; that she never contracted the disease known as gonorrhea, and never suffered from that disease. The testimony of all these medical experts is to the effect that such a condition would not exist if the husband had suffered from the disease.

We call especial attention to the evidence of witness John Haskett, page 74 of printed record. Haskett nursed Warren while he was sick with maiarial fever in December of '93. This witness testifies to a state of facts, which if true (and they are undisputed) absolutely preclude the possibility of Warren's ever having had stricture of the urehtra. His testimony, with the testimony of the several medical experts, disprove beyond the possibility of a doubt the claim that George E. Warren ever had stricture.

The Court below permitted the questions and answers contained in the application to go to the jury; also permitted evidence to go to the jury tending to prove the general averment in the

answer "that he had had a disease or diseases other than as stated in his application;" so that the question as to the truth of the answers made by George E. Warren in his application were submitted to the jury; the issue was squarely made and the jury found under the testimony and the charge of the Court against the defense that Warren had given FALSE ANSWERS to any questions asked and answered in the application which were at all material to the risk. The questions having been submitted to and settled by the jury, and the jury having found that no answers were given by George E. Warren which were false, it can no longer be material whether Section 3625 of the Revised Statutes is repugnant to a provision of the Constitution of the United States or not. The judgment is clearly right, and its affirmance by the Supreme Court of Ohio was in accordance with the law and facts of the case.

Counsel contend that the answer to question 18 was untruthful in that Warren answered that he had not had a disease of the throat, whereas Dr. Gast testified that he had treated him for tonsilitis in 1892. It would seem that the Insurance Company is driven into the last ditch for an argument, for certainly it would not claim that tonsilitis was inimical to longevity, or that it seriously affects health, or is constitutional. If it had been disclosed at the trial that some time within ten years next preceding the date of the application, George E. Warren had suffered from that so much dreaded disease known as the "itch," we presume the plaintiff in error, in its distress would now claim that Warren had answered untruthfully when he stated that he had never had or been predisposed to "skin diseases," one of the infirmities mentioned under question 18. If it had been disclosed at the trial that some time within ten years next preceding the date of the application, George E. Warren had suffered from a boil, and had consulted a physician in relation to it; or had suffered with a

cold and consulted a physician; or had suffered with constipation of the bowels, the answer to question 19, to-wit: "Have you ever had any illness or disease other than as stated by you above?" having been "No," we suppose the plaitiff in error would now claim that George E. Warren answered falsely, and having warranted all his answers to be true, this answer would work a breach of the warranty and would avoid the policy. Such a claim would hardly seem of sufficient seriousness to require notice, yet it is precisely the claim of counsel for plaintiff in error.

We assume that the diseases referred to as coming within a warranty in an application for a life insurance policy, are such as "INDICATE VICE IN THE CONSTITUTION," or which have "A SERIOUS BEARING ON HEALTH," that "AFFECT GENERAL HEALTH AND LONGEVITY," or "WHICH ARE CONSTITUTIONAL IN THEIR NATURE AND CHARACTER." That they do not include mere "temporary ailments or functionary disorders," such as tonsilitis, a boil, or the itch, or even gonorrhoea. If there were no untruthful answers made by Warren in his application as to questions which were material to the risk (and the jury below found there were not), then it would seem that it was unnecessary in the decision of the case by the Supreme Court of Ohio for that Court to pass upon the constitutionality of Section 3625, Revised Statutes, for if there were no "false answers" given in the application, then there was no breach of the alleged warranty, and the policy would not be void by its terms, and the defense made by the answer failed without regard to Section 3625 of the Ohio statutes.

We contend that the defense made by the Insurance Company by its answer totally failed; that there was NOT A SINGLE FALSE ANSWER MADE BY WARREN TO A SINGLE QUESTION IN THE APPLICATION. The defense made

by the Insurance Company in the Court below cast upon the plaintiff in error the burthen of satisfying the jury that answers were falsely given to questions which were material; that the answers given were not only false, but that they were known by Warren to be false at the time he made them, and were made for the purpose of defrauding the defendant Company. These are the averments of the answer, in proof of which the Insurance Company most signally failed, and the jury found upon the issues against the Company, and the verdict and judgment were therefore sustained by both the evidence and the law; and the Supreme Court of Ohio was justified in affirming the judgment below, because there is no evidence to sustain the defense, and because the action was confessed, and because "IT WILL BE NOTICED THAT THE INSURANCE COMPANY FAILS TO ALLEGE THAT THE ANSWERS TO THE QUESTIONS WERE MATERIAL, AND WITHOUT SUCH ALLEGATION THE ANSWER FAILED TO STATE A GROUND OF DEFENSE, AND IT MATTERS NOT HOW FALSE AND FRAUDULENT SUCH ANSWERS MAY BE, IF THEY ARE NOT MATERIAL, THEY FURNISH NO GROUND FOR DEFENSE TO THE COMPANY ISSUING THE POLICY."

We contend, therefore, that the undisputed facts developed in the case were such that even under the decision rendered by the Supreme Court of the State of Ohio in the case of Insurance Company vs. Pyle, 44 Ohio State, 19, the Court would have been compelled to instruct the jury to return a verdict in favor of the plaintiff below.

Referring further to the so-called statement of facts, the plaintiff in error, at page 4 of counsel's brief, makes the following statement:

"Because the jury were instructed by the trial Court that

the whole question was governed and controlled by Section 3625, Revised Statutes of Ohio, and that under that section the jury were to determine, EVEN AFTER A CLEAR CASE OF FRAUD HAD BEEN PROVEN, whether such fraud was material to the risk and should avoid the policy."

We beg to submit that nothing in the charge of the Court below sustains this statement of counsels' brief.

We further call attention to the portions of the Court's charge which the plaintiff in error has quoted and embodied in its brief at pages 5 and 6. It will be observed that certain parts of the charge of the trial Judge are selected out and quoted. Following these quotations at page 6 will be found the following:

"Proper exceptions were noted to each of these charges, and brought before the Supreme Court of the State of Ohio."

We look in vain in the record to find any "exceptions" taken to those parts of the Court's charge quoted by counsel, and which plaintiff in error now points out as objectionable; nor were these parts of the Court's charge specially brought before the Supreme Court of the State of Ohio. We do find by a reference to the printed record, pages 97 and 98, that plaintiff in error (defendant below), after the Court had charged the jury in a most full, clear and accurate exposition of the law of the case, did point out and except to certain parts of the Court's charge, which portions so excepted to, by reference to the record, see pages 97 and 98, we find to be as follows:

"And thereupon counsel for defendant excepted to the following language contained in said charge to the jury as follows: The question asked to which the false answer is given must be of the character designated in the provisions of the statute which I have read in your hearing. This law being in force at the time this policy of insurance was taken out, is applicable to the policy of insurance involved in this case, and is applicable to the questions and answers in the application that by the terms of the policy are made express warranties as well as those that are not. Parties are presumed

to contract with reference to the law of the state upon the subject with reference to which they are contracting, and this section of the statute is to be taken in connection with that contract, and you are to determine, therefore, whether or not the question asked to which the false answer was given was or was not such as under this section of the statute would avoid the policy of insurance."

Again, " And thereupon counsel for the defendant excepted to the following language contained in said charge to the jury as follows. 'It must be made fraudulently.' "

"And thereupon counsel for the defendant excepted to the following language contained in said charge to the jury, as follows: 'It must be material and concerning a material matter in the effecting of the policy, and but for such answer to the question the policy of insurance would not have been issued; and moreover, that the agent of the Company had no knowledge of the falsity of the statement.' "

"And thereupon counsel for the defendant excepted to the following language contained in said charge to the jury, as follows: 'Now if you find any statement made by George E. Warren in his application to the defendant for this policy of insurance was false, and that question and that answer was of the character designated in this statute, then it would avoid the policy, that is, if it was wilfully false and fraudulently made, and material, and induced the Company to issue the policy, and but for it they would not have issued it, and they had no knowledge of it, then it would avoid the policy. But if it was not material or so made, it would not have that effect, and that you are to determine from the testimony that has been introduced in this trial. If you find from the testimony in this case that George E. Warren did not make any false statements in his application for this policy of insurance, or that if he did, and these questions asked and answers given that were false were not of such a character as under these instructions would avoid the policy of insurance, then the policy would not be void, and plaintiff would be entitled to recover upon it: and if he is entitled to recover upon it, gentlemen of the jury, under this policy of insurance, it being admitted that proof of death was furnished upon the 5th day of December, he would be entitled to recover interest upon this amount from that date.' "

No other or further exceptions were taken to the Court's

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charge. We submit whether plaintiff in error can here for the first time raise questions of error not disclosed in the record, and which were not before the Courts below. It was the duty of the defendant below, if it felt itself aggrieved by any ruling of the Court, to have saved its exceptions. It is too late now. We assume as a correct proposition of law that "the charge of the trial Court upon a particular issue cannot be reviewed where no exception was taken thereto at the time."

When the John Hancock Insurance Company entered the State of Ohio to carry on the business of life insurance under the franchise granted it by the State of Ohio, it agreed to be bound by the laws of Ohio on the subject of life insurance. It could come into the State under the conditions imposed, or stay out. It chose to come in. When it entered into the contract of insurance with George E. Warren, and issued its policy, it made Section 3625 of the Revised Statutes of Ohio as completely a part of the contract as if that section had been written in the body of the contract itself. It contracted with reference to the statute. It knew that the contract "must be expounded according to the laws in force at the time the contract was made."

"IT IS WELL SETTLED THAT CONTRACTS MUST BE EXPOUNDED ACCORDING TO THE LAWS IN FORCE AT THE TIME THEY ARE MADE, AND PARTIES ARE AS MUCH BOUND BY A PROVISION CONTAINED IN A LAW AS IF THAT PROVISION HAD BEEN INSERTED IN AND FORMED PART OF THE CONTRACT."

Jewett vs. Railway Co., 34 Ohio State, page 607.
Smith vs. Parsons, 1 Ohio, 240 and 241.
Michigan Railway Co., vs. Brown, 26 Ohio State, 223.
Linderman vs. Ingham, 36 Ohio State, 10.

Who will say that the John Hancock Insurance Company had

not the right to waive all objections to Section 3625 Revised Statutes and agree to be bound by its terms and very letter? Who will say that it had not the right to embody the provisions of Section 3625 in the contract of insurance? This is exactly what it did in law when it issued the policy of insurance to George E. Warren, and it would seem that by the very familiar rules of estoppel it will not now be heard to say the statute is unconstitutional. It did not speak when it was bound to speak. It chose to make the contract. It has had the benefit of all the advantage of the contract. It received the money of the insured and kept it; it has never offered to return it, or any part of it. It is too late now to object. It is estopped.

If this is not so, and the contention of the plaintiff in error is the law of the land, then the party who pays money for insurance has no protection whatever, and no contract of insurance is stronger than "a rope of sand." With the almost innumerable questions and answers covering the entire lifetime of the insured, asking him as to all sorts and manner of diseases and ailments, and the answers to all of which are made warranties, if the Company can avoid the policy by showing that any one of them is technically untrue, whether material or not, then no policy of insurance is of the value of the time it takes to write it, and all life insurance is a delusion and a fraud.

We might with great propriety adopt the vigorous language of counsel as used at page 51 of their brief and say: the preamble to such a law should be a law to protect life insurance companies who intentionally defraud the ignorant and innocent out of their money under the fraudulent pretence of providing for their widows and orphans. We cannot believe that the construction of life insurance contracts contended for by counsel in this case will ever be adopted by the courts of the land.

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SECTION 3625 R. S. OF OHIO.
A Constitutional Enactment.

We maintain that Sec. 3625, of the Revised Statutes of Ohio, is a valid and constitutional enactment, and not inhibited by Art. XIV, of the Amendment to the Constitution of the United States.

The statute in controversy reads as follows:

> "Sec. 3625. No answer to any interrogatory, made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer. (75 V. 572. Par. 18.)"

The plaintiff in error is a corporation duly incorporated under the laws of the State of Massachusetts, doing business in the State of Ohio under the authority of the State of Ohio. (printed record, pp. 2 and 8.)

The authority granted the plaintiff in error to carry on the business of life insurance in Ohio emanates from the State, and the privilege the authority confers is a franchise. The plaintiff in error could not carry on its business in Ohio without first obtaining the authority of the state. To do so would be the unlawful exercise of a franchise.

Western Union Tel. Co. vs. Meyer, 28 O. S., 522.
State Ex. Rel. New England Mut. Life Ins. Co. vs. Redmund. 45 O. S., 214-218.

State Ex. Rel. vs. Life Ins. Co., 47th O. S., 167-179.
State Ex. Rel. vs. Ackerman et al, 51 O. S., 163.
Connecticut Ins. Co. vs. Commonwealth, 133 Mass., 161.
California vs. Pacific R. R. Co., 127th U. S., 40.

In case of a foreign insurance company doing business within the borders of a state, the state has the constitutional right to impose what conditions it sees fit, and if the company accepts the conditions by doing business in the state, it waives all objections to the statutes.

"The authority to do insurance business by a foreign insurance company in the state of Ohio must be granted by a certificate from the Superintendent of Insurance. It emanates from the State, and the privilege it confers is a franchise."

State Ex. Rel. Attorney General vs. Ackerman, 51 O. S., 163.

"A foreign insurance company can do business within Ohio only by consent of Ohio, which consent may be granted upon such terms and conditions as Ohio may think proper to impose. The company has no constitutional right to do business outside the state of its creation. Other states may exclude it altogether, or permit it to do business upon such terms as they see fit to impose."

Lafayette Ins. Co. v. French, 18 Howard, 407.
Paul v. Virginia, 8 Wall, 168.
Durat v. Chicago, 10 Wall., 415.
Doyle v. Continental Ins. Co., 94 U. S., 541.
Phil. Fire Assn. v. New York, 119 U. S., 110.
State Ex. Rel. v. Raymond, 45 O. S., bottom 218.
Blake v. McClung, 172 U. S., 239.

"The right of the state to impose such conditions as it may deem expedient on foreign corporations doing business in such state."

New York State v. Roberts, 171 U. S., 658.

"A state in permitting a foreign corporation to become

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one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions, without which the franchise could not have been obtained."

Ashley v. Ryan, 153 U. S., 436.

"It is well settled that a corporation is not a citizen within the meaning of the constitutional provision that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.'"

Paul. v. Virginia, 8 Wall, 168, 178, 179.
Ducat v. Chicago, 10 Wal., 410, 415.
Liverpool Ins. Co. v. Mass., 10 Wall, 566, 573.
Blake v. McClung, 172 U. S., 239.
Hooper v. California, 155 U. S., 648.
Ins. Co. v. Daggs, 172 U. S., 557.

In the case of Paul v. Virginia, 8th Wall., 168, above cited, the Court say:

"The corporation being the mere creation of local law, can have no legal existence beyond the sovereignty where created . . . The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those seates—a comity which is never extended where the existence of a corporation and the exercise of its power are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens, as in their judgment will best promote the public interest. The whole matter rests in their discretion."

We quote the following language from the opinion of the

Court in the case of Crutcher v. Kentucky, 141 U. S., 47, 59:

> "The insurance business, for example, can not be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to the manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous." The court in this case cite as authority:

Bank of Augusta v. Earl, 13 Pet. 519.
Paul v. Virginia, 8 Wall., 168.
Liverpool Ins. Co., v. Mass., 10 Wall., 566.
Cooper Mfg. Co. v. Ferguson, 113 U. S., 727.
Phil. Fire Assn. v. New York, 119 U. S., 110.

Corporations are the creation of the state, and under the constitution of Ohio, Art. XIII, Sec. 2, "Corporations may be formed under general laws, but all such laws may from time to time be altered or repealed." It certainly requires no argument to establish the proposition that a foreign corporation is bound to take notice of the Constituion and of the statutes of the state, imposing conditions upon the corporation in respect to the transaction of its business within the state.

In the case of Fritz v. Palmer, 132 U. S., 282, the Court say: "Sec 260, of the statute of Colorado, provides 'foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and Secretary of State, . . . and no other corporation doing business in the state, incorporated under the laws of any other state, shall be permitted to mortgage, pledge, or otherwise incumber its real or personal property situated in this state to the injury or exclusion of any citizen, citizens, or corporations of this state who are creditors of such foreign corporations, and

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no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state shall take effect as against any citizen or corporation of this state until all its liabilities due to any person or corporation within this state, at the time of recording such mortgage, have been paid and extinguished.' No question is made in this case (see page 288), indeed, there can be no doubt as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign or interstate commerce. In Cooper Manufacturing Company v. Ferguson, 113 U. S., 727, 732, the Court say: 'The right of the people of a state to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state, has been settled by this Court."

In Blake v. McClung et al, 172 U. S., 259, in delivering the opinion of the Court, Justice Harlan says:

> "As to the plaintiff in error, the Hull Coal & Coak Company, of Virginia, different considerations must govern our decision. It has long been settled that for purposes of suit by or against it, in the Courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the state creating such corporation; Louisville, Cin. and Charleston R. R. Co. v. Letson, 2 How., 497; Covington Drawbridge Co. v. Shepard, 20 How., 227, 232; Ohio & Miss., R. R Co. v. Wheeler, 1st Bl., 286, 296; Steamship Co. v. Tugman, 106 U. S., 118, 120; Barrow Steamship Co. v. Kane, above cited; and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the state under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' Paul v. Virginia, 8 Wall., 168, 178, 179; Ducat v. Chicago, 10 Wall., 410, 415; Liverpool Ins. Co. v. Mass., 10 Wall.,

566, 673. The Virginia corporation, therefore, can not invoke that provision for protection against the decree of the State Court, denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee Court. Since, however, a corporation is a person, within the meaning of the Fourteenth Amendment (Santa Clara County v. The Sou. Pac. R. R. Co., 118 U. S., 394, 396; Smith v. Ames, 169 U. S., 466, 522) may not the Virginia corporation invoke for its protection the clause of the amendment declaring that no state shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws? We are of opinion that this question must receive a negative answer. Although this Court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities (Ex Parte Virginia, 100 U. S., 339, 346-7; Yick Wo. v. Hopkins, 118 U. S., 356, 373; Scott v. McNeal, 154 U. S., 34, 45; and C. B. & Q. R. R. v. Chicago, 166 U. S., 226, 233) it does not follow that within the meaning of that amendement the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not in any legal sense deprived of its claim, nor was its right to reach the assets of the British corporation in other states or countries disputed. It was only denied to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that state. It had notice of the proceedings in the state court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of Art. XIV of the Constitution of The United States relating to the privileges and immunities of citizens in the several states, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the State Court erred in its decree, in reference to that corporation, the latter cannot be said to have been thereby deprived of its property without due process of law within the meaning of the Constitution."

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We think that the principle and questions involved in the case at bar, for which we contend, are decisively settled by this Court in the case of Orient Insurance Co. v. Daggs, 172 U. S., p. 557, the syllabi of which case are as follows:

"The provision in Sec. 5897 of Chap. 89, Art 4, of the Revised Statutes of Missouri that 'in all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of a total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy, and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial loss the measure of damages shall be that portion of the value of the whole property insured, ascertained in the manner hereinafter described, which the part injured bears to the whole property insured, and the provision in Sec. 5898 that no condition of any policy of insurance contrary to the provisions of this article shall be legal or valid,' are not, when applied to a foreign corporation, insuring property within the state in conflict with the provision of the Fourteenth Amendment to the Constitution of The United States, forbidding a state to make or enforce a law which shall abridge the privileges or immunities of citizens of the United States or deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of its laws.

2. "A corporation is not a citizen within the meaning of that amendment, and hence has not the privileges and immunities secured to citizens against state legislation."

3. "That which a state may do with corporations of its own creation, it may do with foreign corporations admitted into it."

Hooper v. California, 155 U. S., 648, cited, approved and applied."

It is contended by counsel for the plaintiff in error that there is no public policy involved in the enactment of said Sec. 3625, and that the same is odious class legislation, but we think neither point is well taken. This statute and others of a similar nature rest upon considerations of public policy. It is well known that the practice of insurance companies, both life and fire, led to the legislation that is the subject of attack. Promises held forth to the assured in the policies in use when this and similar statutes were enacted had "too often proved a delusion and a snare," and as the Courts were powerless to correct the evil, the legislatures of the states interposed to remedy the great wrongs and outrages that were being perpetrated upon their citizens. This statute and others were enacted in this state as long ago as 1878 to provide aginst the evils that had grown up throughout the state and caused much litigation where insurance companies were seeking to avoid liability--although confessedly the fraud had been perpetrated by the agent—yet the companies were seeking to avoid liability, by charging home the fraud of their own agents—treating them not as their agents, for whom they were responsible—but treating them as third persons whose fraud should relieve the company from liability. In many cases they provided in their contracts, that the agent of the company should be considered the agent of the assured, &c., &c. In the language of Brewer, J.,--in reference to the enactment of similar statutes in Missouri—"It is notorious that many insurance companies were rigorous in insisting upon forfeitures, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof." Foster, J, in referring to a similar statute of New Hampshire, said: "The policy and purpose of the law were to promote honest, open dealing, to do equal justice, to pro-

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tect the confidence reposed by the insured in those with whom he may contract, and to spring the traps concealed in the mass of rubbish, before the unwary traveler shall have put his foot in them; to prevent and prohibit, in short, the farce and fraud by which it has too often been found that the party apparently insured by the stipulations written upon one side of a piece of paper, was uninsured by the conditions involved in the insurance typography indorsed upon the other side of the same piece of paper." Williams, J., in the Supreme Court of Ohio, in stating the object of these statutes, in the case of Ins. Co. v. Leslie, 47th O. S., 413, says: "The conditions contained in policies of insurance, both life and fire, and the exceptions to the risk, and the contingencies upon which the company should be relieved from liability, became so numerous and complicated, usually printed in small type upon the back of the policy, in terms in which persons unlearned in the law or business of insurance would not readily understand, that it became a matter of no little difficulty for the assured to tell whether the policy afforded him any indemnity or not; and when the event insured against happened, the uncertainty of his claim against the company, constrained him to abandon, compromise, or litigate it. The legislatures of several of the states enacted statutes designed to give greater certainty to the contract of insurance, and protect the assured against unreasonable forfeitures and defenses; which statutes, it is generally held, apply to and control all policies issued after their enactment, &c."

The same Court, in the case of State Ex. Rel. v. Ackerman et al, 51 O. St., 163, in their opinion on page 189, say:

> "Insurance, in its early existence, when the nature of the risks assumed were few, and the amount of business small,

was done chiefly, if not entirely, by individuals. But in more recent times it has been extended until it embraces almost every kind of risk, and has grown to such proportions that it enters into every department of business, and affects all classes of people and their property; and has, in consequence, everywhere become the subject of legislative regulation and control. The several states have enacted laws, designed to place the business within their limits upon such substantial basis as will afford adequate protection to the citizens, and their property. There can be no doubt of the power of the state to do so; nor, that the power extends to the enactment of such laws as its legislative body may deem wise and proper for the purpose, not in conflict with the fundamental law; and, therefore, within the legitimate exercise of that power, foreign companies may be excluded altogether from doing business in the state, or admitted on their compliance with such terms and conditions as its legislature chooses to impose. There has been enacted in this state an extensive code or system of laws, covering the whole subject of insurance, regulating the incorporation of companies and associations for the transaction of the various kinds of insurance, and prescribing their powers and duties, defining the scope and effect of their policies, and otherwise regulating their business."

This condition of things prevailed in our state to such an extent that the legislature evidently deemed it just that there should be some legislation on the subject to protect the public, and hence Sec. 3625, and other similar statutes, are enacted for the protection of the public generally, and are founded upon public policy.

Sec. 3625 was enacted by the legislature, and in force in Ohio, at the time, and for more than twenty years before the policy in controversy was issued by plaintiff in error. Prior to the issuing of the policy in controversy, it had been held by at least three of the inferior courts of this state that Sec. 3625 was a constitutional enactment, and not inhibited by Art. XIV of the Constitution of The United States; notably by the 8th Circuit Court, January term, 1893, in the case of The New York Life Ins. Co. v.

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Block et al, 12th Ohio C. C. Reports, 224, and in the case of the Prudential Life Ins. Co. of America v. Kilbaine, November term, 1897, 15th Ohio C. C. Report, 62, and in the case of Nat. Life Ins. Co. v. Probst, afterwards affirmed in 56th O. St., 728, by the Supreme Court. And a similar statute, relating to fire insurance companies, passed many years ago, was held to be founded upon considerations of public policy by the Supreme Court of Ohio, in case of Ins. Co. v. Leslie, 47th O. St., 409, in which case the Court say: "The statute cannot, we think, be treated as conferring upon the assured a mere personal privilege which may be waived or qualified by agreement. It has a broader scope. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. Terms and conditions embraced in the policy, inconsistent with the provisions of the statutes, are subordinate to it, and must give way."

The rule is well settled that the statutes of a state in which a foreign insurance company is permitted to do business enter into and form a part of the contract of insurance.

As early as the case of Smith v. Parsons, 1st Ohio, 239, we find the following: "Although a state legislature can not pass laws impairing contracts, yet they may regulate them, prescribe their form, their effect and the mode of their discharge, and every contract is supposed to be made with reference to those laws." On page 240-241 the Court say: "The legislature has a right by law to regulate contracts, to determine their effect and to point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception receives an impress from the law; and the effect of the

law, being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement, and it was more correct to say that the law has in part made the contract, then it has changed it."

The authority of Smith v. Parsons has been sustained by a continuous and unbroken line of decisions by the Ohio Supreme Court down to the present time.

Bank of Chillicothe v. Swain et al, 8 Ohio, 283-4.
Mansfield, Coldwater & Mich. R. R. Co. v. Brown et al, 26th O. St., 224.
Jewett v. Railway, 34 O. St., 607.
Linderman v. Ingham, 36 O. St., 10.
Compton v. Ry. Co., 45 O. St., 619.
Wile v. The State, 46 O. St., 452.
Ins. Co. v. Leslie, 47 O. St, 409.
Railway Co. v. Defiance, 52 O. St., 314.

In further support of the same proposition, we submit the following authorities:

Joyce on Insurance, Vol. 1, Sec. 194.
Hoglan v. Cin. Ry. Co., 18 Ind., 452.
Wanschaff v. Masonic Mut. 41 Mo., App., 211.
Fry v. Charter Oak Ins. Co., 35 Fed. Rep. 197.
Weingartner v. Charter Oak Ins. Co., 32 Fed. Rep., 314.
Bryan v. Ins. Co., 96 U. S., 627.
Wash. Cent. Nat. Bank v. Hume, 128 U. S., 195, 206.

When the John Hancock Mutual Life Insurance Company of Massachusetts, plaintiff in error, entered into the contract of insurance, and issued its policy of insurance in this case, it was apprised of the laws of the State of Ohio, of the rule that the statute of a state enters into and forms part of the contract; it was apprised of the fact that the Constitution of The United States nowhere deprives the State of the power and right to prescribe the conditions upon which it will permit foreign insurance

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companies to do business within its boundaries; it was apprised that the state has the power to prevent the making of contracts altogether within its borders by foreign insurance companies; it was apprised of the public policy of the state, as declared in its statutes.

The statute makes no unjust discrimination against foreign insurance companies; by its terms it applies alike to all life insurance policies, whether foreign or domestic.

That the statute is not obnoxious to the inhibition against class legislation is well settled.

In the case of the Orient Insurance Co. v. Daggs, 172 U. S., 557, and also in the case of Tullis v. Lake Erie & Western Ry. Co., decided by the Supreme Court of The United States December 11th, 1899, the Court pass upon this question. In the latter case. Chief Justice Fuller, in delivering the opinion of the Court, quotes approvingly the decision in the case of Ins. Co. v. Daggs, and cites other authorities, as follows:

"In Orient Insurance Co. v. Daggs, in which an act of the State of Missouri in respect of policies of insurance against loss or damage by fire was drawn in question, the objection that the statute discriminated between fire insurance companies and companies engaged in other kinds of insurance was overruled, and it was said that the power of the state to distinguish, select and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary, and that the classification of the Missouri statute was not objectionable in view of the differences between fire insurance and other insurance. Railroad v. Mackey, and Railroad Co. v. Beckwith were cited and approved. And see Magoun v.

Ill. Trust and Savings Bank, 170 U. S., 283; Pacific Ex. Co. v. Seibert, 142 U. S., 339; Railroad Co. v. Mathews, 174 U. S, 96."

The classification between life insurance and other insurance is not only practical, but elementary. The classification can not be considered as arbitrary, but it is a natural classification in harmony with the character of the business transacted.

Counsel for plaintiff in error, in their comments on the section of the statute, have taken issue with the legislature, as to the propriety of its passage. Their claim that an action for fraud can be maintained to set aside a contract, or recover for the breach thereof, "although the party making the false representations believed them to be true when he made them, and had good reasons for so believing," is not sustained by the authorities cited by them. The first case cited, Mulvey v. King, 39 O. S., 491, holds the opposite doctrine. It is a case where relief is granted on the ground of mutual mistake, and on account of failure of consideration. The Court in this case cite Allen v. Shackelton, 15 O. S., 145; Taylor v. Leith, 26 O. S., 428; and Aetna Ins. Co. v. Reed, 33 O. S., 283, in support of the proposition that it is "well settled in this state by the cases cited that an action for damages caused by misrepresentation can not ordinarily be maintained, without proof of actual fraud, or such gross negligence as amounts to fraud." In this case the Court concludes its opinion as follows: "The rights of the purchaser do not rest upon the ground of fraud, actual or constructive, but that, to the extent of the difference of value between the property as it was represented to be, and the property conveyed there is no consideration for his promise. He can not, upon any principle of law or equity, be compelled to pay for what the vendor did not own, and could not convey."

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The second case cited, Wilson v. Irwin, 45 O. S., 426, was a case where there was a mutual mistake as to the material part of the subject of the exchange of real estate, and the same was caused by representations of a third party, and no negligence could be imputed to the plaintiff, and relief was granted on the ground of mistake and failure of consideration. The Court distinguished this case from a case in the 18th O. S., 536, of Crist v. Dice, where the action for recision was on the ground of fraud, and the Court held that the action could not be maintained on the ground of fraud.

"The essential feature of fraud is a false representation of fact, made with a knowledge of its falsehood, or willfully and in reckless disregard whether it be true or false, with the intention that it shall be acted upon, that it is material, and actually induces the complaining party to act upon it."

Aanson on Contracts, p. 199.
Pomeroy's Equity Jur.., Vol. 2, pp. 357, 385, Par., 876, 898.

"The last requisite to a fraudulent representation is that it must furnish a substantial inducement to the contract; in other words, it must be material. In the language of the civil law, it must be *dolus dans locum contractui*. The test is whether the party would have entered into the contract if the fraudulent representation had not been made."

Bispham's Principles of Equity, p. 273, Par. 216.

Counsel for plaintiff in error are mistaken as to the law of fraud when they affirm that a party in Ohio may "rescind or avoid a contract, or recover for a breach thereof, although the party making the false representations, believed them to be true when he made them, and had good reason for so believing." Such is not the law of this state. Our statute treats all persons alike un-

der like circumstances and conditions, both in privileges conferred and in liabilities imposed, and in protection given. All life insurance companies are alike subject to the same conditions, liabilities and responsibilities, and all citizens of the state alike are afforded the same protection.

Counsel for plaintiff in error argue as though the effect of the statute is to apply the rule as to fraud to the insurer, and the rule as to mutual mistake and failure of consideration to the assured, but there is no warrant for such an interpretation. In Ohio, the law governing the recision of contracts on account of fraud applies practically the same rule both to the insurer, through the statute in question, and to the assured through the ordinary rule of common law.

Sec. 3625 makes no such radical change as counsel claim, and its provisions are not unreasonable if it were a question for the Court, and not one of legislative discretion. It is a practical, fair and efficient measure for correcting the evils it was intended to provide against.

Learned counsel for plaintiff in error have included in their brief a lengthy argument against what they consider the bad policy of the statute, but we do not deem it necessary to defend the wisdom of the legislatures of our own and other states, as to the propriety and necessity of such legislation in the interest of the public.

What we maintain is that the legislature, in the enactment of this statute has not exceeded its authority; that the statute is not against, but rather founded on public policy; that the enactment of said statute is not class legislation; that in the several states the subject matter of insurance is a franchise; that the states have a right to prescribe the terms and conditions upon which they will grant such franchises; that foreign insurance companies accepting such franchises with their terms and condi-

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tions are bound thereby, and must accept the burdens with the benefits; that Sec. 3625 R. S. of Ohio was in force at the time, and long prior to the time the policy of insurance was issued, and the legal effect is the same as if the section were copied into and made part of the policy; that the section is "a valid constitutional enactment;" that the section, before the policy in this case was issued, was held by the inferior courts of Ohio to be a valid constitutional enactment, and not in violation of the Fourteenth Amendment to the Constitution of The United States, and that one of the decisions mentioned was affirmed after the issuing of the policy by the unanimous decision of the Supreme Court of Ohio, in Nat. Life Ins. Co. v. Probst, 56 O. S., 728; and the said section was held constitutional by a like unanimous decision by our Supreme Court in this case, and we respectfully submit that its decision should be affirmed by this court.

Respectfully submitted,

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